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### Taking Notes in School (Committee): Cyr v. Madawaska, Blethen v. Portland School Committee, and the Public's Right to Know

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TAKING NOTES IN SCHOOL (COMMITTEE): *CYR V. MADAWASKA*, *BLETHEN V. PORTLAND SCHOOL COMMITTEE*, AND THE PUBLIC'S RIGHT TO KNOW

*Benjamin J. Tucker*

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TAKING NOTES IN SCHOOL (COMMITTEE): *CYR V. MADAWASKA*, *BLETHEN V. PORTLAND SCHOOL COMMITTEE*, AND THE PUBLIC'S RIGHT TO KNOW

Benjamin J. Tucker\*

I. INTRODUCTION

In 2007, the Maine Supreme Judicial Court, sitting as the Law Court, decided *Cyr v. Madawaska School Department*,<sup>1</sup> and recently decided *Blethen Maine Newspapers Inc. v. Portland School Committee*.<sup>2</sup> These decisions will guide the actions and behavior of municipal, school department, and elected officials in Maine, and will also affect public access to information under Maine's broad "right to know" law, the Freedom of Access Act (FOAA).<sup>3</sup>

In *Cyr*, a split court held that an investigative report commissioned by the Madawaska School Department must be redacted to maintain the confidentiality of information relating to the personal history, general character, or conduct of an employee.<sup>4</sup> Although the FOAA generally requires disclosure of public records, certain information in the Madawaska investigative report was exempted under Maine law.<sup>5</sup> The Law Court vacated the Superior Court,<sup>6</sup> which had ordered full disclosure of the report.<sup>7</sup>

In *Blethen*, the Law Court considered two aspects of the FOAA: first, the provision allowing executive session for certain purposes to shield information from public disclosure; and second, the scope of the definition of "public records."<sup>8</sup> The Superior Court had found that the Portland School Committee had held a partially illegal executive session; further found that certain documents used and created at the session were public records; and finally, ordered the disclosure of the documents, subject to redaction of confidential information.<sup>9</sup> On appeal, the Law Court vacated the Superior Court and found that the School Committee's executive session was lawful, and therefore the documents created for it, as well as notes taken during the session, are not subject to public disclosure.<sup>10</sup>

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1. 2007 ME 28, 916 A.2d 967.

2. 2008 ME 69, 947 A.2d 479.

3. ME. REV. STAT. ANN. tit. 1, §§ 401-411 (1989 & Supp. 2007-2008).

4. 2007 ME 28, ¶ 10, 916 A.2d at 970. The court split 4-3, with Justices Alexander, Dana, and Calkins dissenting.

5. ME. REV. STAT. ANN. tit. 20-A, § 6101(2)(B) (1993).

6. *Id.* ¶ 12, 916 A.2d at 971.

7. *Id.* ¶ 5, 916 A.2d at 969.

8. *Blethen Me. Newspapers, Inc. v. Portland Sch. Comm.*, 2008 ME 69, ¶¶ 11-18, 947 A.2d at 482-84.

9. *Id.* ¶ 9, 947 A.2d at 481.

10. *Id.* ¶ 18, 947 A.2d at 484.

This Note will examine *Cyr* and *Blethen*, as well as the statutory and case law background of the FOAA. The Note then explores the implications of these decisions for municipal and school officials, and their attorneys. The combined effect of these decisions will affect the behavior of municipal and school board members and employees statewide. School committees and municipal councils are in need of guidance from the Law Court regarding two key issues: (1) when they can enter executive session (and what the remedy is for an improper executive session), and (2) what the scope of “public records” is under Maine law. This Note concludes that both the Law Court and the Maine Legislature should clarify the scope of the FOAA in order to avoid negative consequences for the conduct of municipal and school business.

## II. *CYR V. MADAWASKA SCHOOL COMMITTEE*

### *A. Background*

In April 2005, Madawaska School Superintendent Danny Michaud decided not to rehire a probationary teacher for the 2005-2006 school year.<sup>11</sup> The decision, combined with long-running controversy over the superintendent’s management style, sparked a furor in the community and led to significant disruptions, including the resignation of Madawaska Middle-High School Principal Conrad Cyr, the resignation of School Committee member Pierette Soucy, and a student walkout.<sup>12</sup> A meeting among student government representatives, the principal, and the superintendent also occurred; parents were excluded from this meeting, and police allegedly stood by to escort away any parent who attempted to enter the superintendent’s office.<sup>13</sup> After these events, the Madawaska School Committee voted to hire Attorney Ervin Snyder to investigate the controversy and “what, if any, role the school committee, administration, and others may have had in the events.”<sup>14</sup> Snyder conducted extensive interviews and issued a written report (the “Snyder Report”) to the school board, which was released to the public in redacted form.<sup>15</sup> Paul A. Cyr, an active Madawaska citizen (no relation to Principal Cyr), requested a full, unredacted copy of the report. The Madawaska School Department denied Cyr’s request, claiming the redacted information was confidential under title 20-A, section 6101(2)(B) of the Maine Revised Statutes.<sup>16</sup> Paul A. Cyr then appealed to the Superior Court, pursuant to the

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11. *Cyr*, 2007 ME 28, ¶ 2, 916 A.2d at 968-69.

12. Beurmond Banville, *Principal Resignation Furor Grows in County*, BANGOR DAILY NEWS, Apr. 29, 2005, at B4 (further explaining that the school committee member was “frustrated with school board bickering and communication problems between the superintendent’s office and the entire community”). Superintendent Michaud eventually resigned in August 2005. Beurmond Banville, *Madawaska Man Seeks Report of School Probe*, BANGOR DAILY NEWS, Nov. 29, 2005, at B3.

13. Banville, *Principal Resignation Furor Grows in County*, *supra* note 12; *see also Cyr*, 2007 ME 28, ¶ 2, 916 A.2d at 969.

14. *Cyr*, 2007 ME 28, ¶ 3, 916 A.2d at 969.

15. *Id.* ¶ 4, 916 A.2d at 969.

16. *Id.* ¶ 4, 916 A.2d at 969; ME. REV. STAT. ANN. tit. 20-A, § 6101(2)(B) (1993 & Supp. 2006-2007) provides:

B. Except as provided in paragraph A, information in any form relating to an employee or applicant for employment, or to the employee’s immediate family, must be kept

FOAA.<sup>17</sup> The Superior Court held a hearing, reviewed the unredacted report in camera, and then ordered the release of the unredacted report in full.<sup>18</sup> The Madawaska School Department then appealed to the Law Court.

On appeal, the School Department argued that the redacted portions of the report are exceptions to the FOAA disclosure requirement because they fall under at least one of three subsections of the statute designating certain employment records confidential.<sup>19</sup> Opening its analysis, the court first found that the Snyder Report is a public record as defined by the FOAA<sup>20</sup> and noted that under the FOAA, any member of the

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confidential if it relates to the following:

- (1) All information, working papers and examinations used in the examination or evaluation of all applicants for employment;
- (2) Medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders;
- (3) Performance evaluations, personal references and other reports and evaluations reflecting on the quality or adequacy of the employee's work or general character compiled and maintained for employment purposes;
- (4) Credit information;
- (5) Except as provided by subsection 1, the personal history, general character or conduct of the employee or any member of the employee's immediate family;
- (6) Complaints, charges of misconduct, replies to complaints and charges of misconduct and memoranda and other materials pertaining to disciplinary action;
- (7) Social security number;
- (8) The teacher action plan and support system documents and reports maintained for certification purposes; and
- (9) Criminal history record information obtained pursuant to section 6103.

17. ME. REV. STAT. ANN. tit. 1, § 409(1) (1989) provides:

1. Records. If any body or agency or official, who has custody or control of any public record, shall refuse permission to so inspect or copy or abstract a public record, this denial shall be made by the body or agency or official in writing, stating the reason for the denial, within 5 working days of the request for inspection by any person. Any person aggrieved by denial may appeal therefrom, within 5 working days of the receipt of the written notice of denial, to any Superior Court within the State. If a court, after a trial de novo, determines such denial was not for just and proper cause, it shall enter an order for disclosure. Appeals shall be privileged in respect to their assignment for trial over all other actions except writs of habeas corpus and actions brought by the State against individuals.

The Bangor Daily News also filed an appeal in Superior Court, but settled for the redacted version. Beurmond Banville, *School System in Violation of State Access Law*, BANGOR DAILY NEWS, Mar. 24, 2006, at A1.

18. *Cyr*, 2007 ME 28, ¶ 5, 916 A.2d at 969.

19. *Id.* ¶ 6, 916 A.2d at 969.

20. *Id.* ¶ 7, 916 A.2d at 969-70; ME. REV. STAT. ANN. tit. 1, § 402(3) (1989 & Supp 2007-2008) provides:

3. Public records. The term "public records" means any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, except:

- A. Records that have been designated confidential by statute.

public may inspect and copy a public record, unless it is otherwise confidential by another statute.<sup>21</sup> The court then noted that under the legislature's directive, the FOAA "shall be liberally construed and applied to promote its underlying purposes and policies," and repeated the judicially-created corollary rule that any statutory exceptions must be strictly construed.<sup>22</sup> The court then reviewed the Superior Court's decision *de novo*.<sup>23</sup>

On review, the Law Court agreed with the School Department that the redacted portions of the Snyder Report are confidential under FOAA section 6101(2)(B)(5).<sup>24</sup> The Court held that "[t]his subsection's directive is clear: to protect school employees from the public disclosure of their, or their family's, general character, conduct, or personal history. The statute is unambiguous, thus rendering a legislative history analysis unnecessary."<sup>25</sup> Therefore, the redacted portions of the Snyder Report cannot be disclosed, with one exception: A subsection of the report containing recommendations to the school board should be disclosed because it did not relate to "the personal history, general character, or conduct" of any employee.<sup>26</sup>

Justice Calkins dissented, joined by Justices Dana and Alexander, disagreeing with the majority's holding and statutory interpretation. The dissent would have affirmed the Superior Court order to disclose the full Snyder Report because the School Department failed to prove that the report fell under a statutory exception.<sup>27</sup> The dissent emphasizes the general rule that the agency claiming a statutory exception to the FOAA (here, the School Department) has the burden of proof, and that "[o]n its face the Snyder Report does not appear to be an employee record."<sup>28</sup> FOAA section 6101, according to the dissent, "is not applicable to this case unless the School Department demonstrates that the Snyder Report is an employee record."<sup>29</sup> The dissent critiques the majority, arguing that

[a] court cannot guess that, just because an investigative report describes actions of school employees and officials, it is an employee record or intended to be kept as an employee record. If [it] were truly the type of record that the Department regards as an employee record, it would not have been difficult for the Department to have supplied evidence to that effect.<sup>30</sup>

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21. *Cyr*, 2007 ME 28, ¶ 7, 916 A.2d at 969-70; ME. REV. STAT. ANN. tit. 1, § 408(1) (1989 & Supp. 2007-2008) provides:

1. Right to inspect and copy. Except as otherwise provided by statute, every person has the right to inspect and copy any public record during the regular business hours of the agency or official having custody of the public record within a reasonable period of time after making a request to inspect or copy the public record.

22. *Cyr*, 2007 ME 28, ¶ 9, 916 A.2d at 970.

23. *Id.* ¶¶ 9-11, 916 A.2d at 970-71.

24. ME. REV. STAT. ANN. tit. 20-A, § 6101(2)(B)(5) (2008) provides: "(5) Except as provided by subsection 1, the personal history, general character or conduct of the employee or any member of the employee's immediate family."

25. *Cyr*, 2007 ME 28, ¶ 10, 916 A.2d at 970.

26. *Id.* ¶ 11, 916 A.2d at 970.

27. *Id.* ¶ 13, 916 A.2d at 971 (Calkins, J., dissenting).

28. *Id.* ¶ 18, 916 A.2d at 972.

29. *Id.* ¶ 16, 916 A.2d at 971 (highlighting that FOAA section 6101 applies only to employee records).

30. *Id.* ¶ 19, 916 A.2d at 972.

Justice Calkins then distinguished the case *South Portland Police Patrol Association v. City of South Portland*,<sup>31</sup> relied on by the School Department.<sup>32</sup>

In *South Portland*, the Law Court ruled against disclosure of the City of South Portland's investigative report by the human resources director about a complaint against a municipal employee.<sup>33</sup> The dissent in *Cyr* argues that the *South Portland* fact pattern is not analogous to the Snyder Report because the Madawaska School Board was not investigating a particular employee, nor was the Snyder Report intended to become part of any employee record.<sup>34</sup>

Responding to the dissent's argument that the Snyder Report was not an "employee evaluation" covered by FOAA section 6101(2)(B), the majority opinion noted that

comments on the role, background, and performance of the two key members of the school administration involved in this controversy are the exact material contemplated by subsection 6101(2)(B). The fact that the School Board sought an evaluation of the employees' performance through an outside source and not through an internal employee evaluation does not make the report any less an employee evaluation.<sup>35</sup>

### B. Analysis of *Cyr*

In *Cyr*, the Law Court split on the issue of statutory interpretation: what is the scope of the "employee record" exemption of FOAA section 6101? The majority characterized the Snyder Report as an "employee record," thus exempting it by statute from the FOAA disclosure requirement. In contrast, the dissent asserted that the report should not be characterized as an "employee record" absent further evidence by the School Department, and should be fully disclosed. Underlying the majority's statutory interpretation is the rationale that the personal privacy and reputation of certain Madawaska School District employees outweighs the public interest in fully knowing the results of a school board's investigation into the actions of school administrators on matters of great significance to the community. The public interest in full knowledge of government action ("right to know") is partially expressed in the stated purpose of the FOAA:

The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly. . . .

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31. 2006 ME 55, 896 A.2d 960.

32. *Cyr*, 2007 ME 28, ¶ 20, 916 A.2d at 972.

33. *S. Portland*, 2006 ME 55, ¶¶ 6-7, 896 A.2d at 963-64 (finding that an internal investigation report of a complaint against a city employee could not be disclosed because ME. REV. STAT. ANN. tit. 30-A, § 2702(1)(B)(5) (1996) mandates confidentiality for "[c]omplaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action").

34. *Cyr*, 2007 ME 28, ¶ 20, 916 A.2d at 972.

35. *Id.* ¶ 12, 916 A.2d at 971.

This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.<sup>36</sup>

However, in enacting the FOAA, the Maine Legislature provided for exceptions to disclosure, which indicated the legislature's recognition that individuals' reputational and privacy interests must sometimes be balanced against the public's right to know, and may sometimes outweigh it. The legislature also recognized the government's interest in efficiency (for example, in negotiating contracts). First, the FOAA authorizes government agencies to conduct executive sessions for specific purposes,<sup>37</sup>

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36. ME. REV. STAT. ANN. tit. 1, § 401 (1989).

37. ME. REV. STAT. ANN. tit. 1, § 405 (Supp. 2007-2008) provides:

Those bodies or agencies falling within this subchapter may hold executive sessions subject to the following conditions.

1. Not to defeat purposes of subchapter. These sessions shall not be used to defeat the purposes of this subchapter as stated in section 401.
2. Final approval of certain items prohibited. No ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official actions shall be finally approved at executive sessions.
3. Procedure for calling of executive sessions. Executive sessions may be called only by a public, recorded vote of 3/5 of the members, present and voting, of such bodies or agencies.
4. Motion contents. A motion to go into executive session must indicate the precise nature of the business of the executive session and include a citation of one or more sources of statutory or other authority that permits an executive session for that business. Failure to state all authorities justifying the executive session does not constitute a violation of this subchapter if one or more of the authorities are accurately cited in the motion. An inaccurate citation of authority for an executive session does not violate this subchapter if valid authority that permits the executive session exists and the failure to cite the valid authority was inadvertent.
5. Matters not contained in motion prohibited. No other matters may be considered in that particular executive session.
6. Permitted deliberation. Deliberations may be conducted in executive sessions on the following matters and no others:
  - A. Discussion or consideration of the employment, appointment, assignment, duties, promotion, demotion, compensation, evaluation, disciplining, resignation or dismissal of an individual or group of public officials, appointees or employees of the body or agency or the investigation or hearing of charges or complaints against a person or persons subject to the following conditions:
    - (1) An executive session may be held only if public discussion could be reasonably expected to cause damage to the reputation or the individual's right to privacy would be violated;
    - (2) Any person charged or investigated shall be permitted to be present at an executive session if he so desires;
    - (3) Any person charged or investigated may request in writing that the investigation or hearing of charges or complaints against him be conducted in open session. A request, if made to the agency, must be honored; and
    - (4) Any person bringing charges, complaints or allegations of misconduct against the individual under discussion shall be permitted to be present.

This paragraph does not apply to discussion of a budget or budget proposal;



and second, the FOAA lists categories exempted from its definition of “public record” in sections 402(3)(A)-(O).<sup>38</sup> Subsection (A), “[r]ecords that have been designated

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- B. Discussion or consideration by a school board of suspension or expulsion of a public school student or a student at a private school, the cost of whose education is paid from public funds, provided that:
    - (1) The student and legal counsel and, if the student be a minor, the student's parents or legal guardians shall be permitted to be present at an executive session if the student, parents or guardians so desire.
  - C. Discussion or consideration of the condition, acquisition or the use of real or personal property permanently attached to real property or interests therein or disposition of publicly held property or economic development only if premature disclosures of the information would prejudice the competitive or bargaining position of the body or agency;
  - D. Discussion of labor contracts and proposals and meetings between a public agency and its negotiators. The parties must be named before the body or agency may go into executive session. Negotiations between the representatives of a public employer and public employees may be open to the public if both parties agree to conduct negotiations in open sessions;
  - E. Consultations between a body or agency and its attorney concerning the legal rights and duties of the body or agency, pending or contemplated litigation, settlement offers and matters where the duties of the public body's counsel to his client pursuant to the code of professional responsibility clearly conflict with this subchapter or where premature general public knowledge would clearly place the State, municipality or other public agency or person at a substantial disadvantage.
  - F. Discussions of information contained in records made, maintained or received by a body or agency when access by the general public to those records is prohibited by statute;
  - G. Discussion or approval of the content of examinations administered by a body or agency for licensing, permitting or employment purposes; consultation between a body or agency and any entity that provides examination services to that body or agency regarding the content of an examination; and review of examinations with the person examined; and
  - H. Consultations between municipal officers and a code enforcement officer representing the municipality pursuant to Title 30-A, section 4452, subsection 1, paragraph C in the prosecution of an enforcement matter pending in District Court when the consultation relates to that pending enforcement matter.

38. ME. REV. STAT. ANN. tit. 1, § 402(3) (Supp. 2007-2008) (listing exceptions to the definition of “public records”) provides:

- A. Records that have been designated confidential by statute;
- B. Records that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding;
- C. Legislative papers and reports until signed and publicly distributed in accordance with legislative rules, and records, working papers, drafts and interoffice and intraoffice memoranda used or maintained by any Legislator, legislative agency or legislative employee to prepare proposed Senate or House papers or reports for consideration by the Legislature or any of its committees during the legislative session or sessions in which the papers or reports are prepared or considered or to which the paper or report is carried over;
- D. Material prepared for and used specifically and exclusively in preparation for negotiations, including the development of bargaining proposals to be made and the

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- analysis of proposals received, by a public employer in collective bargaining with its employees and their designated representatives;
- E. Records, working papers, interoffice and intraoffice memoranda used by or prepared for faculty and administrative committees of the Maine Maritime Academy, the Maine Community College System and the University of Maine System. The provisions of this paragraph do not apply to the boards of trustees and the committees and subcommittees of those boards, which are referred to in subsection 2, paragraph B;
  - F. Records that would be confidential if they were in the possession or custody of an agency or public official of the State or any of its political or administrative subdivisions are confidential if those records are in the possession of an association, the membership of which is composed exclusively of one or more political or administrative subdivisions of the State; of boards, commissions, agencies or authorities of any such subdivisions; or of any combination of any of these entities;
  - G. Materials related to the development of positions on legislation or materials that are related to insurance or insurance-like protection or services which are in the possession of an association, the membership of which is composed exclusively of one or more political or administrative subdivisions of the State; of boards, commissions, agencies or authorities of any such subdivisions; or of any combination of any of these entities;
  - H. Medical records and reports of municipal ambulance and rescue units and other emergency medical service units, except that such records and reports must be available upon request to law enforcement officers investigating criminal conduct;
  - I. Juvenile records and reports of municipal fire departments regarding the investigation and family background of a juvenile fire setter;
  - J. Working papers, including records, drafts and interoffice and intraoffice memoranda, used or maintained by any advisory organization covered by subsection 2, paragraph F, or any member or staff of that organization during the existence of the advisory organization. Working papers are public records if distributed by a member or in a public meeting of the advisory organization;
  - K. Personally identifying information concerning minors that is obtained or maintained by a municipality in providing recreational or nonmandatory educational programs or services, if the municipality has enacted an ordinance that specifies the circumstances in which the information will be withheld from disclosure. This paragraph does not apply to records governed by Title 20-A, section 6001 and does not supersede Title 20-A, section 6001-A;
  - L. Records describing security plans, security procedures or risk assessments prepared specifically for the purpose of preventing or preparing for acts of terrorism, but only to the extent that release of information contained in the record could reasonably be expected to jeopardize the physical safety of government personnel or the public. Information contained in records covered by this paragraph may be disclosed to the Legislature or, in the case of a political or administrative subdivision, to municipal officials or board members under conditions that protect the information from further disclosure. For purposes of this paragraph, "terrorism" means conduct that is designed to cause serious bodily injury or substantial risk of bodily injury to multiple persons, substantial damage to multiple structures whether occupied or unoccupied or substantial physical damage sufficient to disrupt the normal functioning of a critical infrastructure;
  - M. Records or information describing the architecture, design, access authentication, encryption or security of information technology infrastructure and systems. Records or information covered by this paragraph may be disclosed to the Legislature or, in the case of a political or administrative subdivision, to municipal officials or board members under conditions that protect the information from further disclosure;
  - N. Social security numbers in the possession of the Department of Inland Fisheries and Wildlife; and
  - O. Personal contact information concerning public employees, except when that information is public pursuant to other law. For the purposes of this paragraph:

confidential by statute,” is the broadest exception, and unfortunately the text does not cross-reference to other specific statutes (such as title 20-A, section 6101 discussed above).<sup>39</sup>

The court in *Cyr* simply fit the Snyder Report into a convenient and plausible statutory exception, but it did not discuss the competing public and private interests. And it also did not discuss the standards for reviewing disputed information in camera to guide lower courts in the future. In 2005, the Law Court in *Blethen Maine Newspapers v. Maine*<sup>40</sup> (*Blethen (2005)*) had recognized the need for balancing public and private interests, and as in *Cyr*, the Law Court ordered the disclosure of public records with confidential information redacted.

In *Blethen (2005)*, a divided court ruled that the public interest in understanding the Attorney General’s investigation of sexual abuse allegations against deceased Roman Catholic priests outweighed the privacy interests of the deceased priests and their families.<sup>41</sup> The State argued that the information was confidential under a statutory exception to the FOAA, found in title 16, section 614(1)(C) of the Maine Revised Statutes, which prevents disclosure of investigative records if there is a “reasonable possibility that public disclosure [would] constitute an unwarranted invasion of personal privacy,”<sup>42</sup> but the Law Court disagreed. The court identified the public interest was in knowing “why the Attorney General exercised his discretion not to pursue criminal prosecutions in connection with the sexual abuse allegations,”<sup>43</sup> and denied that deceased priests and their families had a protected privacy interest.<sup>44</sup> The court also rejected the adoption of the Federal *Favish* evidentiary requirement (favored by concurring Chief Justice Saufley),<sup>45</sup> which would require an allegation of governmental wrongdoing in order to release investigatory records.<sup>46</sup> The Attorney General was ordered to release disclosure of the records, including the names of deceased priests accused of sexual abuse, after redaction of the names and identifying information of persons other than the deceased priests.<sup>47</sup> The court held that the “central purpose” of the FOAA is “ensuring the public’s right to hold the government

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- (1) “Personal contact information” means home address, home telephone number, home facsimile number, home e-mail address and personal cellular telephone number and personal pager number; and
  - (2) “Public employee” means an employee of a governmental entity, as defined in Title 14, section 8102, subsection 2, except that “public employee” does not include elected officials.

39. The legislature recognized this problem in 2005, amending the FOAA and charging the Right To Know Advisory Committee with developing a website that lists FOAA laws as well as exceptions. Your Right to Know: The Maine Freedom of Access Act, <http://maine.gov/foaa/> (last visited Oct. 31, 2008).

40. *Blethen Me. Newspapers, Inc. v. State*, 2005 ME 56, 871 A.2d 523 [hereinafter *Blethen (2005)*]. For an excellent analysis of the case, see Kenleigh Nicoletta, Case Note, *Blethen Maine Newspapers, Inc. v. State: Balancing the Public's Right to Know Against the Privacy Rights of Victims of Sexual Abuse*, 59 ME. L. REV. 235 (2007).

41. *Blethen (2005)*, 2005 ME 56, ¶ 40, 871 A.2d at 535-36.

42. *Id.* ¶ 10, 871 A.2d at 527 (citing ME. REV. STAT. ANN. tit. 16, § 614(1)(C) (Supp. 2004-2005)).

43. *Id.* ¶ 32, 871 A.2d at 531-32.

44. *Id.* ¶ 25, 871 A.2d at 531-32.

45. *Id.* ¶ 41, 871 A.2d at 536 (Saufley, C.J., concurring).

46. *Id.* ¶ 32, 871 A.2d at 533 (majority opinion).

47. *Id.* ¶ 40, 871 A.2d at 535.

accountable”<sup>48</sup> and announced that its FOAA decision would be guided by a balancing test:

The disclosure of investigative records is not permitted if the invasion of personal privacy is determined to be unwarranted when weighed against the identified public interest that will be served by disclosure. Thus, we examine, in turn, (1) the personal privacy interests of the alleged victims, witnesses, and deceased priests in maintaining the confidentiality of the records sought by Blethen; (2) the public interest supporting disclosure of the records; and (3) the balancing of the private and public interests.<sup>49</sup>

In dissent, Justice Clifford, joined by Justices Rudman and Alexander, invoked public policy, legislative intent, and statutory interpretation to argue that the investigative files should not be released: they would find that the balance would tip the other way in favor of individual privacy interests on the facts of Blethen.<sup>50</sup> Justice Alexander filed an additional dissent to emphasize his objection to changing the confidentiality standards of criminal investigations.<sup>51</sup> Further, he pointed out that “[t]he protections provided by a court-ordered redaction, focused on by the Court, are illusory.”<sup>52</sup>

Although it used a balancing test in *Blethen* (2005), the court did not apply this test in *Cyr*, but instead ruled on the narrow statutory interpretation of the explicit exemption for employee records. Of course, *Blethen* (2005) applied to investigative records held by the Attorney General, not employee records, but in light of its previous holding in *Blethen* (2005), the court could have evaluated the privacy interests in *Cyr*. Perhaps the court in *Cyr* is backing off its broad holding in *Blethen* (2005) because it would prefer to avoid the complicated balancing of privacy interests against the public’s interest in full knowledge of government decision-making. Perhaps a majority saw the employee record statutory provision in FOAA section 6101 as a slam-dunk that required no explanation.

However, after *Blethen* (2005) and *Cyr*, the question of redaction standards was left hanging. As one student commentator has observed, “the court failed to craft a redaction standard that would adequately ensure, in future cases, that any personal privacy interests of those named in such records would be protected from unwarranted public disclosure.”<sup>53</sup>

### III. BLETHEN MAINE NEWSPAPERS V. PORTLAND SCHOOL COMMITTEE

#### A. Background

On July 25, 2007, the Portland School Committee held an executive session in order to, according to its agenda, “consult with counsel and consider the duties of

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48. *Id.* ¶ 32, 871 A.2d at 533.

49. *Id.* ¶ 14, 871 A.2d at 529.

50. *Id.* ¶¶ 51-69, 871 A.2d at 538-42 (Clifford, J., dissenting).

51. *Id.* ¶ 70, 871 A.2d at 542 (Alexander, J., dissenting).

52. *Id.* ¶ 75, 871 A.2d at 543.

53. Nicoletta, *supra* note 35, at 237. She also predicted that “[t]he complexity of this issue is clear from numerous opinions issued by the court in *Blethen*, and will undoubtedly continue to be so in the near future as similar cases enter the courthouse.” *Id.* at 258.

central office staff with respect to the department's financial management."<sup>54</sup> The executive session occurred in the context of a controversial \$2.5 million budget deficit for the Portland School Department.<sup>55</sup> The executive session produced four documents: (1) the "Superintendent's Outline," explaining the Superintendent's management style; (2) the personal notes of School Committee member Ellen Alcorn; (3) the personal notes of School Committee member Lori Gramlich; and (4) the notes of the School Committee's attorney.<sup>56</sup> The Portland School Committee contended that the executive session was pursuant to FOAA section 405, because the discussions were about the "duties" and "job performance" of employees, as permitted under section 405(6)(A).<sup>57</sup> In addition the Committee argued that "public discussion could be reasonably expected to cause damage to one's reputation or privacy interests," invoking the condition of subsection 405(6)(A)(1).<sup>58</sup> The School Committee contends that the executive session was not a discussion of "a budget or budget proposal," which would be prohibited by FOAA section 405(6).<sup>59</sup>

On July 26, 2007, one day after the executive session, the Portland Press Herald (owned by plaintiff Blethen Maine Newspapers, Inc.) requested all records regarding the executive session.<sup>60</sup> The School Committee denied the newspaper's request a few days later, but provided a written description of the notes taken at the session.<sup>61</sup> Meanwhile, the finance director of the Portland School Department resigned.<sup>62</sup> Further, on July 27, School Committee Member Benjamin Meiklejohn posted a comment on the Portland Press website expressing skepticism about the use of executive sessions.<sup>63</sup> The Portland Press Herald filed a complaint with the Superior Court on July 31 seeking injunctive and declaratory relief as well as access to public records.<sup>64</sup>

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54. *Blethen Me. Newspapers, Inc. v. Portland Sch. Comm.*, No. AP-07-40, 2007 WL 4692879, at \*1 (Me. Super. Aug. 21, 2007).

55. *See* Josie Huang, *Newspaper Asks Court to Order Release of Secret Session Records*, PORTLAND PRESS HERALD, Aug. 1, 2007, at A1.

56. *Blethen*, 2007 WL 4692879, at \*2.

57. Brief for Appellant Portland School Committee at 15-17, *Blethen Me. Newspapers v. Portland Sch. Comm.*, 2008 ME 69, 947 A.2d 479 (No. CUM-07-522) [hereinafter Brief for Appellant]; for text of FOAA section 405 *see supra* note 37.

58. Brief for Appellant, *supra* note 57, at 20.

59. *Id.* at 15.

60. *Blethen*, 2007 WL 4692879, at \*2.

61. *Id.*

62. *Id.*

63. *Id.*; *see also* Appendix at 70, *Blethen Me. Newspapers, Inc. v. Portland Sch. Comm.*, 2008 ME 69, 947 A.2d 479 (copy of Portland School Committee member Meiklejohn website comments: "Going into the most recent executive session, I would say that such a reasonable expectation [of damage to reputation or rights violated] most certainly did exist. Having sat through it however, I no longer feel that said expectation exists, and would oppose future motions to enter executive session unless new factors present such a 'reasonable expectation.'"). Meiklejohn also posted, but the Superior Court did not point out, the comment that "[d]iscussion of the budget didn't occur--the topic was the duties and responsibilities of our personnel." *Id.* at 72.

64. *Blethen*, 2007 WL 4692879, at \*6; *see also* Josie Huang, *Newspaper asks court to order release of secret session records*, PORTLAND PRESS HERALD, Aug. 1, 2007, at A1.

*B. Analysis*

The major legal issue relating to the executive session is whether it was a discussion of employee “duties,” as the School Committee argues, or a discussion of “a budget,” as the newspaper argues. After a hearing including testimony from those present at the session, and in camera review of the documents, the Superior Court agreed with the newspaper, and found that portions of the executive session were improper under the FOAA.<sup>65</sup> The court found that the following documents were public records and must be released in full: (1) the “Superintendent’s Outline,” (2) Alcorn’s notes, and (3) Gramlich’s notes.<sup>66</sup> The notes of the attorney, however, were redacted, to protect information privileged under FOAA section 405(6)(A) and (E) and section 402(3)(B).<sup>67</sup>

On appeal to the Law Court, the Portland School Committee (PSC) argued that the Superior Court erred in finding parts of the July 25 executive session unlawful, and erred in finding the documents were public records.<sup>68</sup> According to the PSC, the July 25, 2007, executive session was held “in order to permit [the PSC] to examine the roles certain key central office staff had in the development and maintenance of its budget and assess whether those individuals had adequately performed those roles.”<sup>69</sup> Due to the public controversy surrounding the school system budget problems, “such a discussion could reasonably be expected to damage the reputation of one or more of the staff members involved.”<sup>70</sup> The PSC contended that its executive session was not only permitted, but it was carefully planned in consultation with its legal counsel.<sup>71</sup> PSC Chair John Coyne requested assistance from legal counsel for two purposes: “One was to talk to senior staff and get a better sense of what their duties were with respect to financial management and whether they performed those duties, and the second was to be able to ask [legal counsel] legal questions they might have,” according to the testimony of the attorney.<sup>72</sup> He further testified that he advised the PSC that an executive session for those purposes was legal, but he also warned Chair Coyne that “folks should understand very clearly that this was not an executive session to discuss the budget, solution to the budget, et cetera.”<sup>73</sup> When the PSC met on July 25, it listed the executive session as the first item on its agenda.<sup>74</sup>

In discussions on the motion to go into executive session, concerns were raised by citizens at the meeting, as well as one committee member.<sup>75</sup> The attorney then explained that the purpose of the session was to “discuss personnel issues and ask for

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65. *Blethen*, 2007 WL 4692879, at \*10.

66. *Id.*

67. *Id.* at \*9.

68. Brief for Appellant, *supra* note 57, at 12-28.

69. *Id.* at 1.

70. *Id.*

71. *Id.* at 3.

72. *Id.*

73. *Id.*

74. *Id.* at 4.

75. *Id.*

legal advice,” and not to discuss the budget.<sup>76</sup> The PSC then voted unanimously to move into executive session.

The individuals present at the executive session were: eight members of the PSC (three of whom arrived late after it had convened), the PSC’s legal counsel, Superintendent Mary Jo O’Connor, Finance Director Richard Paulson, and Director of Human Resources Joline Hart.<sup>77</sup> According to the PSC, the attorney first explained the purposes and limitations of the executive session, then Superintendent O’Connor distributed her “Superintendent’s Outline” and gave a presentation on her management philosophy.<sup>78</sup> The PSC contended that the Outline was “prepared solely for the Executive Session and was not provided to anyone outside of it.”<sup>79</sup> Then committee members questioned the staff in attendance, but the PSC contended that “[t]he topic being addressed . . . was not the budget.”<sup>80</sup> The PSC contended that “[a]t no time during the meeting was there any discussion of any budget proposal, . . . the status of the School Committee’s budget, . . . potential reductions to the budget, . . . how to recoup expenditures, . . . how to prevent a recurrence of the budget problem, . . . or how anyone might fix the problem.”<sup>81</sup>

The PSC’s central legal argument was that the executive session was about personnel duties in the context of a budget crisis, not about the budget itself: “although the . . . budget shortfall certainly provided the impetus for the Executive Session, . . . finances were only discussed insofar as they provided a context for the personnel issues being addressed.”<sup>82</sup> PSC counsel called this the “crux” of the issue at oral argument.<sup>83</sup> The PSC distinguished and emphasized the discussion of the employee “duties” because Maine law prohibits “discussion of a budget or budget proposal” during executive session.<sup>84</sup> The PSC argued that public discussion of the duties of the Superintendent and the Finance Director met the condition of section 405(6)(A), and executive session was proper, in that such discussion “could be reasonably expected to cause damage to the reputation” of the employees.<sup>85</sup> To bolster its contention that there was no “discussion” of the “budget”, the PSC parsed out the meanings of those words on appeal.<sup>86</sup>

The PSC argued that although the FOAA did not define “discussion,” “budget,” or “budget proposal,” the Superior Court erroneously interpreted those words broadly to mean any discussion related to the budget.<sup>87</sup> The PSC contended that a reading of section 405(6)(A) in full demonstrates legislative intent to require a public proceeding

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76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 4-5.

80. *Id.* at 5.

81. *Id.* at 6 (citations omitted).

82. *Id.*

83. Recording of Oral Argument at track 1, 2:45, *Blethen v. Portland Sch. Comm.*, 2008 ME 69, 947 A.2d 479 (No. CUM-07-522).

84. See ME. REV. STAT. ANN. tit. 1, § 405(6)(A) (Supp. 2007-2008); for text of FOAA section 405 see *supra* note 37.

85. Brief for Appellant, *supra* note 57, at 13 n.4.

86. *Id.* at 13-14.

87. *Id.* at 13.

“when the public body enters into a debate concerning the specifics of its budget or a budget proposal—even if that discussion is related in some way to personnel issues.”<sup>88</sup> The intent was not meant to operate in the other direction, that is, to force a public discussion on personnel duties merely because those duties involved the budget.<sup>89</sup> The PSC argued that “the plain language of Section 405(6)(A) of the Act compels the conclusion that a public body may discuss personnel or performance matters about specific public employees—even where those matters relate to financial issues—without the discussion turning into one about the public body’s ‘budget.’”<sup>90</sup> The PSC contended that the evidentiary record, primarily witness testimony and legal counsel’s notes, demonstrated that the “sole focus” and “sole topic” of “discussion” at the July 25 executive session was the job performance of the PSC’s employees.<sup>91</sup> In addition, the PSC argued that the legislative history shows that the Legislature did not intend to “provide a broad ban on the discussion of any topic remotely related to a budget,” but was focused on prohibiting the practice of using executive session to discuss the elimination of particular job positions.<sup>92</sup>

The PSC further argued that the Law Court’s interpretation of section 405(6)(A) must be informed by its decision in *Cyr v. Madawaska*, which stands for the proposition that documents relating to the role, background, and performance of school administrators must remain confidential.<sup>93</sup> In *Cyr*, the court interpreted title 20-A, section 6101 of the Maine Revised Statutes to shield such records.<sup>94</sup> The PSC argued that together, these two sections are part of a statutory scheme to keep such information confidential, and that “[i]t would be nonsensical” for documents to remain privileged, but not oral communications about the same issue.<sup>95</sup> The PSC argued that the statutory scheme is intended to balance “an employee’s right to privacy in delicate personnel matters on the one hand, and the public’s right to know about development of, and revisions to, a public entity’s budget on the other.”<sup>96</sup> Citing *South Portland*, the PSC stated that a broad construction of the “budget discussion” prohibition would “swallow the clear rule and undermine the Legislature’s intent to protect public employees from the prejudice that would be caused if damaging accusations that were later determined to be unfounded were aired in public.”<sup>97</sup>

Portland Press Herald (the “Newspaper”) argued that discussing the duties of employees relating to finances is equivalent to discussing the budget, prohibited by section 405(6)(A), and that such discussion therefore invalidated the executive session, making all the documents public records.<sup>98</sup> At oral argument, counsel for the newspaper described the “analytical tree” of section 405(6)(A) to allow a discussion

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88. *Id.* at 14.

89. *Id.*

90. *Id.* at 15.

91. *Id.* at 16-17.

92. *Id.* at 18.

93. *Id.* at 19.

94. *Cyr v. Madawaska Sch. Dep’t*, 2007 ME 28, ¶ 10, 916 A.2d 967, 970.

95. Brief for Appellant, *supra* note 57, at 20.

96. *Id.* at 21.

97. *Id.*

98. Brief of Appellee at 7-13, *Blethen Me. Newspapers, Inc. v. Portland Sch. Comm.*, 2008 ME 69, 947 A.2d 479 (No. CUM-07-522).



of personnel duties *only if* there is a reasonable likelihood of damage to reputation, *and* there is no discussion of the budget.<sup>99</sup>

The Newspaper argued that the Superior Court properly found that the July 25 executive session was unlawful.<sup>100</sup> The factual determination by the Superior Court that there were improper budgetary deliberations cannot be reviewed *de novo*, but only for clear error.<sup>101</sup> The Newspaper pointed out that not only did the Superior Court evaluate testimonial evidence, but also reviewed, in camera, the notes taken by committee members and legal counsel. These documents remained under seal, and thus were never provided to the Newspaper, but the Newspaper suggested that they may provide additional support to the Superior Court's finding.<sup>102</sup> The Newspaper contended that the testimony of legal counsel, Superintendent O'Connor, and Committee member Meiklejohn supports the Superior Court's finding that there was discussion of the budget.<sup>103</sup> The Newspaper also contended that the PSC argued for a "narrow and technical definition of . . . budget, . . . inconsistent with the purposes of the FOAA."<sup>104</sup>

The Newspaper argued that the PSC's attempt to characterize the executive session as a personnel discussion, not a budget discussion, is flawed because the session was in fact both: "[t]he two subjects are not mutually exclusive, and in this case they overlapped."<sup>105</sup> If they overlap, the prohibition on budget discussions should control. The statutory "budget discussion" prohibition, the Newspaper pointed out, is "*appended to, and thus modifies*, the exception to the overarching open meeting requirement that permits executive sessions on certain personnel matters."<sup>106</sup> Therefore, according to the Newspaper, the most logical interpretation of section 405(6)(A) is that "the Legislature intended the budget provision to modify, and thus trump, the personnel matters exception."<sup>107</sup> Discussions of the budget problem should not be shielded from the public by characterizing them as discussions of duties of the personnel responsible for the budget.<sup>108</sup> The Newspaper suggested as an alternative ground for affirming the Superior Court that "disclosure would not have been damaging to the reputation of the employees."<sup>109</sup>

A statutory requirement for executive session discussion of personnel duties is the reasonable expectation of damage to reputation or privacy.<sup>110</sup> The Newspaper argued that the PSC had no "objectively reasonable expectation that personnel matters discussed in the Executive Session would cause damage to anyone's reputation" and

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99. Recording of Oral Argument, *supra* note 83, track 3, 2:15.

100. Brief of Appellee, *supra* note 98, at 7.

101. *Id.*

102. *Id.* at 7 n.2.

103. *Id.* at 7-10.

104. *Id.* at 11.

105. *Id.*

106. *Id.*

107. *Id.* at 11-12.

108. *Id.* at 12.

109. *Id.* at 13.

110. ME. REV. STAT. ANN. tit. 1, § 405(6)(A)(1) (Supp. 2007-2008); for text of FOAA section 405 *see supra* note 37.

a “subjective fear of harm” would not be enough.<sup>111</sup> According to the Newspaper, “there was no evidence before the Superior Court that the job performance issues discussed in the Executive Session involved anything other than ‘honest mistake[s].’”<sup>112</sup> Further, a public official cannot have a reasonable expectation of privacy about the performance of public duties such as budget management.<sup>113</sup>

The PSC countered with the fact that the Finance Director resigned after the executive session.<sup>114</sup> The reasonable expectation of reputational damage from a discussion of possible “misfeasance or malfeasance” was “obvious” and borne out by events.<sup>115</sup> On July 25, the committee discussed not “a mere arithmetic error,” but the performance of its own employees: “if the discussion showed a failure in job performance (or worse yet that staff had made misrepresentations to the School Committee) that person’s reputation would have been damaged.”<sup>116</sup>

The Superior Court held that the documents associated with the July 25 session are public records and must be released.<sup>117</sup> These documents included the notes taken by individual PSC members at the meeting.<sup>118</sup> The Newspaper argued that this was correct because the FOAA definition of “public record” is expansive, and has been construed broadly by the Law Court.<sup>119</sup> The Superior Court was correct, the Newspaper argued, because notes taken by PSC members meet the plain language definition under section 402(3): they are “written” material and they were “prepared for use in connection with . . . public or governmental business.”<sup>120</sup> The Newspaper contended that only a statutory amendment could create an exemption for personal notes, and that the Law Court must affirm the Superior Court under the current FOAA.<sup>121</sup> Although the Law Court has not previously ruled on the public record status of personal notes from an executive session, the Newspaper cited a 1992 decision by Justice Lipez in Maine Superior Court that ordered the release of notes held by Portland city officials regarding an illegal executive session.<sup>122</sup> The Newspaper urged the Law Court to adopt the same logic and require the disclosure of the PSC members’ notes.<sup>123</sup> The PSC replied that Justice Lipez in *Guy Gannett* ordered the disclosure of only those portions of notes created during the illegal part of an executive session, not the notes reflecting the legal portion.<sup>124</sup> The PSC agreed that portions of notes from an unlawful executive session should indeed be disclosed, but that “[t]o the extent the

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111. Brief of Appellee, *supra* note 98, at 13-14.

112. *Id.* at 15. However, the Newspaper does not assess the significance of the resignation of the Finance Director after the executive session.

113. *Id.* at 16 n.4.

114. Reply Brief of Appellant Portland School Committee at 4 n.3, *Blethen Me. Newspapers v. Portland Sch. Comm.*, 2007 ME 28, 916 A.2d 976 (No. CUM-07-522) [hereinafter Reply Brief].

115. *Id.*

116. *Id.* at 5.

117. *Blethen*, 2007 WL 4692879, at \*10.

118. *Id.*

119. Brief of Appellee, *supra* note 98, at 17.

120. *Id.* at 17-18.

121. *Id.* at 18.

122. *Id.* at 19 (citing *Guy Gannett Publ’g Co. v. City of Portland*, No. CV-92-858, 1992 Me. Super. LEXIS 220, at \*13-14 (Sept. 24, 1992)).

123. Brief of Appellee, *supra* note 98, at 19.

124. Reply Brief, *supra* note 114, at 6.

Court finds that the Executive Session was lawful, notes relating to that session are not ‘public records.’”<sup>125</sup>

In a 1984 case, *Wiggins v. McDevitt*, the Law Court had ordered the release of a public official’s private tax return because it contained information related to the transaction of public business.<sup>126</sup> The Newspaper argued that the PSC members’ notes are analogous to the tax return in *Wiggins*.<sup>127</sup> The PSC argued that the personal notes are not analogous to the *Wiggins* tax return because the notes are “personal”: they do not relate to the transaction of public business.<sup>128</sup> The PSC argued that the Law Court should be guided by the federal judiciary’s construction of the Federal Freedom of Information Act (FOIA).<sup>129</sup> However, the Newspaper observed that the federal FOIA does not define public records, as the Maine FOAA does, and federal courts have defined public records more restrictively than Maine’s statutory definition.<sup>130</sup> Due to the apparent legislative objective to define public records in a broad manner, the Newspaper argued Maine courts are not free to construe exceptions to the FOAA defining the term in a more restrictive manner akin to the federal definition.<sup>131</sup> The Newspaper also dismissed the PSC’s analysis of other state authorities because their right-to-know statutes are unlike Maine’s.<sup>132</sup> Then the Newspaper turned to the issue of the attorney notes taken on July 25.

The Newspaper argued that the attorney’s notes must be disclosed, subject to redaction of privileged information under FOAA section 402(3)(B), because they were not protected by the work product doctrine.<sup>133</sup> The Law Court held in 2000<sup>134</sup> that a party seeking to block disclosure must demonstrate: (1) a “subjective anticipation of future litigation,” and (2) that the anticipation was “objectively reasonable.”<sup>135</sup> The Newspaper argued that the PSC did not meet its burden of proof, and that the July 25 session had “nothing to do with any actual or potential litigation.”<sup>136</sup> The participation of an attorney in a meeting should not be used to subvert the purpose of the FOAA, the Newspaper urged.<sup>137</sup> The PSC replied that the Portland Press Herald had threatened to sue the School Committee, an actual threat of a lawsuit which should trigger the work product doctrine protecting its attorney’s notes.<sup>138</sup>

Finally, the Newspaper urged the court not to create any exemptions to the FOAA, and suggests that it “require or encourage the creation of recordings or transcripts of

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125. *Id.*

126. 473 A.2d 420, 424 (Me. 1984).

127. Brief of Appellee, *supra* note 98, at 20.

128. Brief for Appellant, *supra* note 57, at 24.

129. *Id.* at 26.

130. Brief of Appellee, *supra* note 98, at 20-21.

131. *Id.* at 21.

132. *Id.* at 21-23.

133. *Id.* at 24.

134. *Springfield Terminal Ry. Co. v. Dep’t of Transp.*, 2000 ME 126, 754 A.2d 353 (holding that communications from DOT officials to the DOT chief counsel regarding possible eminent domain proceedings were privileged work product).

135. Brief of Appellee, *supra* note 98, at 25 (citing *Springfield*, 2000 ME 126, ¶ 16, 754 A.2d at 357).

136. *Id.* at 26 (emphasis omitted).

137. *Id.*

138. Reply Brief, *supra* note 114, at 8.

executive sessions to facilitate judicial review.”<sup>139</sup> The Committee urged the Law Court to vacate the Superior Court decision and protect the confidentiality of the PSC’s discussions on July 25, and give “guidance” to school committees and their attorneys.<sup>140</sup>

#### V. CONCLUSION: TOO MUCH SECRECY?

The Law Court had an opportunity in *Blethen v. Portland School Committee* to clarify two aspects of the FOAA: (1) when a public body may enter into executive session, and (2) what constitutes public records. *Cyr v. Madawaska* told school boards that they may be able to redact information from public records relating to employee’s job performance, but it did not establish standards by which redaction should occur. However, in its recent *Blethen* decision, the Law Court did not touch on the issue of redaction standards because it ultimately vacated the Superior Court and decided in *Blethen* that the Portland School Committee’s executive session was lawful, and that the documents and notes are not open to the public at all.<sup>141</sup> In its unanimous decision, the Law Court issued a sweeping new rule: documents produced exclusively for a lawful executive session, and notes made during such a session, are not public records and are not open to public inspection.<sup>142</sup> The Court acknowledged that “[n]either the definition of ‘public records’ nor the exception for executive sessions address the treatment of documents prepared for or notes taken in connection with a legal

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139. Brief of Appellee, *supra* note 98, at 27 n.5.

140. Recording of Oral Argument, *supra* note 83, at track 4, 5:15.

141. *Blethen Me. Newspapers, Inc. v. Portland Sch. Comm.*, 2008 ME 69, ¶ 18, 947 A.2d 479, 484. Although the Law Court decided that personal notes taken during executive session are shielded from the public, one issue left unresolved by the court in *Blethen* is whether personal notes outside of executive session are public records. On its face, Maine’s FOAA would seem to include personal notes taken by school committee members at public meetings as public records. And if such notes are considered to be “prepared for use in connection with the transaction of public or governmental business or contain[] information relating to the transaction of public or governmental business,” ME. REV. STAT. ANN. tit. 1, § 402(3) (1989), then members of public bodies will have to be prepared to release any notes, even including those taken at home (because there is no physical location limitation in the statute), in any medium. (Might “notes” also include e-mail, instant messaging, text messages and voice mail?) From the perspective of the Newspaper in *Blethen*, the public nature of personal notes is already a reality under current law. However, it is unclear whether public officials understand or believe this to be the case, and the Law Court did not answer the question of whether all personal notes are covered by the definition of public record. In comparison, several New England states exempt notes and other materials prepared by employees that are personal or “preliminary.” Connecticut’s Freedom of Information statute provides that “[n]othing in the Freedom of Information Act shall be construed to require disclosure of . . . [p]reliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure.” CONN. GEN. STAT. ANN. § 1-210(b)(1) (West 2007 & Supp. 2008). Massachusetts law exempts “notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit.” MASS. GEN. LAWS ANN. ch. 4, § 7.26(e) (West 2006 & Supp. 2008). Also note that Maine’s FOAA provides an exemption for state legislators’ “records, working papers, drafts and interoffice and intraoffice memoranda.” ME. REV. STAT. ANN. tit. 1, § (402)(3)(C) (1989 & Supp. 2007-2008).

142. *Blethen*, 2008 ME 69, ¶ 18, 947 A.2d at 484.

executive sessions [sic.],”<sup>143</sup> but justified the new rule by asserting that “[t]o hold otherwise would produce an absurd and illogical result.”<sup>144</sup>

The Law Court, without any further discussion, has thus created a shield for documents prepared for or during lawful executive sessions. Presumably, documents from an unlawful executive session would be public records, but documents from a partially unlawful session would have to be evaluated on a case-by-case basis as in *Guy Gannett* and *Wiggins*. The *Blethen* court did decide that a school committee can properly discuss the performance of its employees relating to financial matters such as budget deficits, notwithstanding the prohibition on discussions of the budget under section 405(6)(A).<sup>145</sup> And while the Law Court decided that personal notes taken by school committee members during a lawful executive session are *not* public records, the court did not discuss whether personal notes qualify as public records under any situation.

The Law Court had announced a balancing test in *Blethen* (2005) that would weigh the public interest in acquiring information against the privacy interests of those about whom information would be disclosed. After *Blethen* (2005) and *Cyr*, the names of deceased priests accused of sexual abuse that appear in Attorney General investigatory records are not protected, but a report created for a school board about the conduct of a school superintendent carrying out his public duties is redacted to protect his privacy. One would expect the court to have found that the privacy interests of the priests, who were never formally charged with any crimes, would deserve protection, whereas the privacy of a school superintendent making decisions about how to run a public school system would not. In both cases, a shift of one vote on the court would have tipped the outcome the other way.

Whatever the logic of the balancing test outcomes in *Blethen* (2005) and *Cyr*, the same balancing test should have been applied in deciding *Blethen* to reach a different outcome. The public interest in understanding the reasons for Portland’s \$2.5 million school budget deficit was strong. Once financial mismanagement of such magnitude came to light, the school committee should have discussed the job performance of its Superintendent and Financial Officer publicly, and required public testimony by the officers. Financial and management problems of that nature cannot be severed from budget discussions, however hypertechnically defined. The language and structure of FOAA section 405(6)(A) indicate that the Maine Legislature considered financial management of municipal and school budgets too important to be discussed in secret. Documents produced by school or municipal management officials for such discussions do not seem to have the weight of personal privacy interests attached to them. Further, the Maine Legislature included in the FOAA a liberal rule of construction in section 401,<sup>146</sup> whose spirit conflicts with the court’s new automatic shield for documents prepared for executive session.<sup>147</sup>

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143. *Id.*

144. *Id.* (citing *Cyr v. Madawaska Sch. Dep’t*, 2007 ME 28, ¶ 9, 916 A.2d 967, 970).

145. *Id.* ¶ 16, 947 A.2d at 483.

146. ME. REV. STAT. ANN. tit. 1 § 401 (1989) (“This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.”).

147. Are documents prepared for executive session now to be treated as permanently confidential, even if the public body decides to discuss the same matter later in public?

In conclusion, the Law Court has significantly limited the scope of the FOAA by explicitly shielding executive session records from public view. Shielding all records produced for, or during, executive sessions is a dramatic decision which may alter the behavior of municipal bodies in significant ways. The unanimous decision is a strong endorsement of secrecy in local government. It remains to be seen whether this broad new exemption from the FOAA will improve the quality of local government decisions, or will simply decrease public access to the decisions of their representatives, perhaps undermining Maine's tradition of open and transparent government.